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FEDERAL COMMUNICATIONS COMMISSION  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Closed Captioning and Video Description ) MM Docket No. 95-176  
of Video Programming )  
 )  
Implementation of Section 305 of the )  
Telecommunications Act of 1996 )  
 )  
Video Programming Accessibility )  
 )

**COMMENTS OF DIRECTV, INC.**

DIRECTV, Inc.<sup>1</sup> hereby submits the following comments in response to the Commission's Notice of Proposed Rulemaking ("*Notice*") in the above-captioned proceeding.

**I. INTRODUCTION**

New Section 713 of the Communications Act,<sup>2</sup> added by the Telecommunications Act of 1996 ("1996 Act"), requires the Commission to prescribe rules and implementation schedules for the closed captioning of video programming.<sup>3</sup> Congress' goal in enacting Section 713 was to ensure that video services are accessible to hearing impaired individuals, in order to

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<sup>1</sup> DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, Inc., a licensee in the DBS service and majority-owned subsidiary of HE Holdings, Inc., a Delaware Corporation.

<sup>2</sup> 47 U.S.C. § 613.

<sup>3</sup> 47 U.S.C. § 613(b), (c).

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ensure more broadly that “all Americans ultimately have access to video services and programs.”<sup>4</sup>

As the nation’s foremost provider of Direct Broadcast Satellite (“DBS”) service, DIRECTV has supported and continues to support the goal of making closed-captioned programming available to as many hearing impaired subscribers as possible. DIRECTV’s Castle Rock Broadcast Center has been designed specifically to promote the seamless pass-through of closed captioned programming, including line 21 of the Vertical Blanking Interval (“VBI”).<sup>5</sup> DIRECTV is committed to working with the Commission to ensure that workable closed-captioning rules are set in place that achieve the goal of wider accessibility to video programming for individuals with hearing disabilities.

DIRECTV also, however, strongly urges the Commission to be mindful of the effect that its Section 713 implementing rules may have on emerging competitors in the multichannel video programming distributor (“MVPD”) marketplace, and to remember that the 1996 Act -- indeed, Section 713 itself -- is a balance of competing policies. Congress has sought to extend the benefits of telecommunications technologies such as closed captioning to hearing impaired Americans, even as it has elsewhere in the statute sought to continue the momentum gained from the 1992 Cable Act in introducing new MVPD competition to entrenched cable

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<sup>4</sup> H.R. Rep. No. 458, 104th Cong., 2d Sess. 182-83 (1996) (“*Conference Report*”).

<sup>5</sup> Closed captioning is hidden as data encoded within the VBI of the television signal. In 1976, the Commission adopted rules which provide that line 21 of the VBI is to be used primarily for the transmission of closed captioning. *Notice* at ¶ 7; *see* Captioning for the Deaf, Report and Order, 63 FCC 2d 378 (1976).

television monopolies.<sup>6</sup> Thus, Congress was careful in Section 713 to strike a balance between imposing a closed captioning obligation and ensuring that the Commission has the discretion to tailor that obligation to the competitive marketplace by suspending that obligation in situations where it would be “economically burdensome” to programmers or MVPDs.<sup>7</sup>

Consistent with the intent of Congress, the Commission should “balance the need for closed captioned programming against the potential for hindering the production and distribution of programming.”<sup>8</sup> It would be unfortunate indeed if costly captioning obligations ended up reducing either the volume of programming available in the marketplace or the number of available distribution outlets, when the goal of Section 713 is to promote access to programming, albeit to a special class of subscribers. DIRECTV below offers more specific comments on the implementation proposals in the *Notice*.

## **II. DISCUSSION**

### **A. The Commission Should Not Place Responsibility For Closed Captioning on MVPDs**

As a threshold matter, the Commission wishes to determine “where the responsibility lies for ensuring that video programming is closed captioned, and which entities

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<sup>6</sup> See, e.g., 47 U.S.C. §§ 571-573; *Conference Report* at 178 (new OVS provisions designed to “introduce vigorous competition into entertainment and information markets”); see also 47 U.S.C. § 628 (program access provisions designed to promote MVPD competition to cable); 1996 Act § 207 (directing FCC to promulgate regulations prohibiting restrictions that impair viewers’ ability to receive video programming through devices designed for reception of over-the-air broadcast, MMDS and DBS signals).

<sup>7</sup> 47 U.S.C. § 613(d).

<sup>8</sup> *Conference Report* at 183.

should be required to comply with those requirements.”<sup>9</sup> Significantly, there is no dispute among the parties -- or, for that matter, the Commission -- that it is most efficient and economical to place responsibility for the captioning of prerecorded programming at the production source.<sup>10</sup> Nevertheless, the Commission has tentatively decided to place responsibility for compliance with captioning obligations on “video programming providers” such as DIRECTV, on the theory that such providers “are in the best position to ensure that the programming they distribute is closed captioned.”<sup>11</sup> DIRECTV respectfully disagrees, and urges the Commission to rethink this conclusion.

In enacting Section 713, Congress found that “[i]t is clearly more efficient and economical to caption programming at the time of production and to distribute it with captions than to have each delivery system or broadcaster caption the program.”<sup>12</sup> The Commission itself recognizes that, from a practical standpoint, captioning at the production stage is “the most efficient manner to include closed captioning with video programming.”<sup>13</sup> Given these findings it is difficult to see why increasing the regulatory burdens on distributors of video programming makes any legal or policy sense.

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<sup>9</sup> *Notice* at ¶ 26.

<sup>10</sup> *See id.* at ¶ 27 (& citations) (observing that in response to NOI, broadcast, cable, wireless and DBS commenters all generally agree that the responsibility for captioning should be placed at production source, and that it would be “inefficient and burdensome” to do so at the distribution level).

<sup>11</sup> *Id.* at ¶ 28.

<sup>12</sup> H.R. Report No. 204, 104th Cong., 1st Sess. (1995) 114 (“*House Report*”); *see Conference Report* at 184 (adopting House version of Section 713).

<sup>13</sup> *Notice* at ¶ 30.

DIRECTV exercises no control over the programming it carries, and certainly has no control at the production stage. It is true, as the Commission suggests, that DIRECTV, because of its “role in purchasing programming from producers,” has the ability to request that programmers it wishes to carry themselves agree to provide closed captioning.<sup>14</sup> But that fact is largely irrelevant from the standpoint of the Commission’s desire to encourage closed captioning. Because an MVPD merely passes through closed captioned programming to subscribers (and DIRECTV conceptually has no objection to requirements that ensure that there are no distributor-imposed technical barriers to the transmission of captioned programming), the most that an MVPD would be in a position to do from a FCC compliance standpoint would be to drop offending programmers which do not caption their programs (and of course, from a business standpoint, seek contractual indemnification from such programmers for any liability incurred).

The only party truly in a position to remedy the lack of captioning is the programmer that has failed to provide it. While the threat of MVPD refusal to carry non-captioned, non-exempt programming may provide more incentive for programmers to caption, that incentive is incremental at best once the obligation is imposed. On the other hand, the monitoring and compliance burdens imposed on MVPDs -- especially those like DIRECTV that carry a large number of channels -- are potentially significant if MVPDs must devote resources to checking whether each program transmitted on their systems is closed captioned.<sup>15</sup> Indeed, given

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<sup>14</sup> *Id.* at ¶¶ 28, 30.

<sup>15</sup> Given the very wide range of programming owners and offerings, with differing programmatic and technical standards, requiring MVPDs to police captioning problems that may arise on all of the services they carry would be an extremely onerous administrative and fiscal burden. For example, if MVPDs must establish monitoring systems and procedures to deal with closed

that the most likely enforcement mechanism of the captioning obligation will be through a complaint process,<sup>16</sup> the end result of the Commission's assignment of captioning responsibility to the provider could be to embroil an MVPD in costly litigation over a requirement it truly has no ability to effectuate.<sup>17</sup> DIRECTV does not believe that such an end result was the intent of Section 713.

## **B. Transition Rules For New Programming**

DIRECTV supports the Commission's conclusion that it is not practical to mandate the immediate captioning of all non-exempt video programming.<sup>18</sup> DIRECTV agrees that mandatory captioning requirements should be phased in over a long enough period to adjust to new and increased demand,<sup>19</sup> and believes that the Commission's "benchmark" approach to implementing the phase-in of captioning obligations is conceptually sound. With respect to setting the transition period, DIRECTV urges the Commission to adopt a longer term, ten-year

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captioning complaints, it will require a mechanism to compare captioning transmitted from the broadcast headend to the captioning received by the consumer's receiver, real-time comparisons to catch glitches and captioning problems, and dedicated personnel to respond to captioning complaints. DIRECTV does not believe that this is either a feasible or desirable outcome for new MVPD entrants attempting to establish cable-competitive businesses, especially when they have little to no ability to cure serious captioning defects that occur at the programming source. Similarly, the imposition of extensive recordkeeping and reporting requirements would be counterproductive. The Commission should not require nascent MVPDs to expend more (and precious) resources than are necessary to achieve the objectives of Section 713.

<sup>16</sup> *Id.* at ¶ 122.

<sup>17</sup> Of course, if an MVPD creates original programming, the obligation would apply to the MVPD with respect to that programming.

<sup>18</sup> *Notice* at ¶ 40.

<sup>19</sup> NOI Comments of NBC at 11.

plan that will give programmers (and providers, if the Commission adopts its current approach to allocating the compliance burden), the discretion and requisite flexibility to phase in closed captions for new programming in a manner that is tailored to their business plans and market demand.

Because DIRECTV does not in the first instance believe that the closed captioning obligation should be borne by MVPDs, DIRECTV objects to any Commission-imposed transition plan that would measure compliance with the captioning obligation based upon a measure of MVPD capacity or channels that feature captioned programming.<sup>20</sup> Nevertheless, to the extent that such a measure is adopted, DIRECTV strongly urges that it be implemented as flexibly as possible. To the extent, for example, that a phase-in of captioned new programming is imposed upon distributors using quantified percentages (*e.g.*, 25% of new programming captioned after three years on a ten-year time line), such percentages should be calculated on a system-wide basis. Such a calculation at least makes possible, as the Commission suggests, a “more rational, market driven allocation of captioning resources.”<sup>21</sup>

### **C. Exemptions Of Classes Of Programming And Providers**

Section 713 gives the Commission the express power to exempt programs, classes of programs, or services from the captioning requirement where the Commission has determined

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<sup>20</sup> In the event that captioning obligations are imposed on service providers, the Commission should clarify that the compliance obligation for broadcast programming retransmitted on MVPD systems should be imposed solely on the broadcasters, which are independent FCC licensees.

<sup>21</sup> *Id.* at 43. Thus, the Commission should resist the urge to micromanage by specifying different categories of programming to be phased in over a particular time frame, as long as an aggregate percentage benchmark of captioned programming is reached.

that compliance would be “economically burdensome” to the provider or owner of such programming.<sup>22</sup> There are several classes of programming that DIRECTV urges the Commission to exempt from captioning obligations as economically burdensome to programmers or providers.<sup>23</sup>

**1. Live Sports Programming and Other Live Events (*Notice* ¶ 84)**

In response to the Commission’s NOI, a number of parties highlighted the difficulties involved in captioning live sports programming. These problems include: (1) technical or logistical problems with delivering different programs to different affiliates in various parts of the country at the same time; (2) a lack of stenocaptioning services in regions where particular games will be televised, making it impossible for the captioner to see the game and caption it in real time; and (3) a lack of encoding equipment at the site from which the local programming is transmitted by uplink.<sup>24</sup> Although the Commission acknowledges these comments, it nevertheless concludes that “all sports programming” should not be exempted from closed captioning obligations, stating that there “is no evidence that the captioning of sports programming, in general, is economically burdensome.”<sup>25</sup> That assertion is not correct, at least with respect to live sports programming.

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<sup>22</sup> 47 U.S.C. § 613(d).

<sup>23</sup> At the outset, DIRECTV notes that any captioning obligation that might apply under Section 713 should clearly not apply to transponder lessors or private subscription services that do not offer programming for public consumption. Such a result does not appear to be contemplated by the statute, and there is no legal or policy basis for the Commission to expand the captioning obligation in this fashion.

<sup>24</sup> *Notice* at ¶ 66 (and cited parties).

<sup>25</sup> *Id.* at ¶ 84.

Prerecorded sports programming can be closed captioned with relative ease, but live sports programming cannot -- the process is difficult and costly. Although captioning may be economically feasible for some high-profile live sports events, such as the NCAA Men's Basketball Championships mentioned in the *Notice*, such events constitute only a tiny fraction of the many thousands of live sports events broadcast annually.<sup>26</sup>

Captioning of live sporting events must be done at the source of the event -- at the arena, stadium, racetrack or mountain-top; otherwise there would be a significant time lag between the event shown and the actual caption. Given the Commission's own observations that (1) there is a quite limited availability of real time captioning resources --currently, only about 100 real time captioners nationwide;<sup>27</sup> and (2) the cost of closed captioning live programming is "expensive" -- ranging from \$120 to \$2500 per hour for a stenocaptioner, depending on the quality of captioning demanded,<sup>28</sup> the costs to programmers or MVPDs that carry thousands of hours of live sports programs could be staggering, rising into the tens of millions of dollars annually. Indeed, with costs of this potential magnitude, it is unlikely that smaller and regional sports programmers could survive such a captioning obligation.

While live sports is one of the most popular categories of live programming, the same reasoning also applies generally to other live events, *e.g.*, concerts, which also require real

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<sup>26</sup> *Id.* at ¶ 66. Furthermore, as the Commission also notes, the NCAA Men's Basketball Championships was a joint effort among several funding and captioning resources. *Id.* This fact only highlights the expense that would be imposed on a single entity if live sports and other such events are not declared exempt.

<sup>27</sup> *Id.* at ¶ 24.

<sup>28</sup> *Id.* at ¶ 115.

time stenocaptioning from remote locations. Live sports and other such “event” programming should be exempted from captioning requirements as “economically burdensome.”

## 2. **Library Programming (Notice ¶¶ 51-62)**

The Commission has defined “library programming” as programming “first published or exhibited prior to the effective date of its closed captioning rules.”<sup>29</sup> DIRECTV agrees with the Commission that this programming should be exempt from captioning obligations.<sup>30</sup>

There is little question that the cost of mandatory captioning of programming libraries would be enormous. And DIRECTV agrees that such a rule would simply encourage program producers to archive programming rather than distribute it in order to avoid the costs of the captioning obligation -- a result that plainly will not increase programming availability to the hearing impaired public. Congress itself has recognized that “economic or logistical difficulties make it unrealistic to caption all previously produced programming,”<sup>31</sup> and has noted that, in general, it does not intend Section 713 to result in “previously produced programming not being aired due to the costs of captions.”<sup>32</sup>

DIRECTV believes that the Commission can best effectuate the Section 713 goal of “maximizing the accessibility” of library programming<sup>33</sup> by encouraging further the voluntary

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<sup>29</sup> *Id.* at ¶ 511; *see* 47 U.S.C. § 613(b)(2).

<sup>30</sup> *Id.* at ¶ 58.

<sup>31</sup> *House Report* at 114.

<sup>32</sup> *Id.*

<sup>33</sup> 47 U.S.C. § 613(b)(1).

captioning of library programming, which has been relatively successful to date. Such efforts, combined with market pressures, will drive program owners to caption popular, previously produced offerings.<sup>34</sup>

**3. Interstitials, Promotional Advertisements And Other Short Form Materials (*Notice ¶ 79*)**

DIRECTV agrees with the Commission's conclusion that the burden of requiring captioning for interstitials and promotional advertisements outweighs the benefit of mandatory captioning.<sup>35</sup> These types of programming are produced on extremely short production and turn-around schedules, and have an extremely short "shelf life." The benefit of captioning such offerings would be slight relative to the costs involved.

DIRECTV also would note that many such "short-form" program offerings are carried on so-called "barker" channels on DIRECTV and other MVPD systems. Such channels consist almost entirely of film trailers, promotions of upcoming subscription events, access card information, etc. DIRECTV urges the Commission to clarify that barker channels would qualify for a Section 713 exemption as well.

**4. Programming Primarily Textual In Nature (*Notice ¶ 73*)**

The programming that DIRECTV carries that falls within this category includes on-screen program guides and schedules, stock tickers, and various other short-term announcements. DIRECTV believes that this type of programming "stands alone," with a high level of visual information imparted to the hearing impaired. Generally, any audio associated

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<sup>34</sup> DIRECTV notes that many of its pay-per-view offerings include library programming.

<sup>35</sup> *Notice* at ¶ 79.

with these offerings is duplicative of the textual material. DIRECTV therefore believes that such programming is properly exempted from closed captioning, which would be redundant and economically burdensome.

**5. Background Music (*Notice ¶ 82*)**

The Commission has correctly concluded that background music and performances that are primarily instrumental should be exempt.<sup>36</sup> DIRECTV's Music Choice® offerings, for example, contain no video at all, and would be quite complicated and costly to caption, with little corresponding benefit to subscribers with hearing loss.

**6. Foreign Language Programming (*Notice ¶ 72*)**

To the extent that carriage of such programming is itself a goal that the Commission may wish to promote, *e.g.*, to serve ethnic populations around the country, the imposition of captioning obligations could deter such carriage. Moreover, DIRECTV is uncertain as to the pool of bilingual stenocaptioners actually available in the United States, but believes that, currently, it is quite small. DIRECTV therefore believes that foreign language programming also should be exempt from captioning requirements, at least until such programming becomes more widespread.

**D. There Is No Need For Commission-Adopted Standards For Quality And Accuracy Of Closed Captioning**

Although there is no explicit call in the Act to do so, DIRECTV does not oppose the Commission's proposal to require that MVPD systems deliver intact closed captioning data

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<sup>36</sup> *Id.* at ¶ 82.

contained on line 21 of the VBI (which, as mentioned, is already the case with DIRECTV). In fact, DIRECTV believes that this requirement is the proper and only captioning obligation that should apply to MVPDs. Once again, programmers are in the best position to comply with closed captioning requirements. With respect to the Commission's specific proposal to extend Section 76.606 of its rules to all MVPDs, the Commission must ensure in doing so that the rule, and in particular incorporated requirements currently crafted as "decoder requirements for television receivers," are technically adapted to the distribution systems and decoder boxes of new MVPD services.<sup>37</sup>

DIRECTV also agrees that there is no need for Commission regulation of the non-technical aspects of closed captioning. There is no evidence that there are problems with respect to the quality of closed captioning that would warrant FCC intervention at this time.

### **III. CONCLUSION**

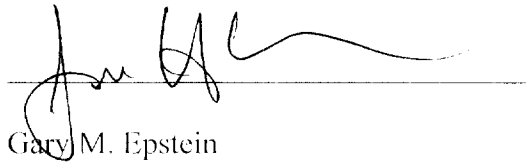
The Commission can and should make every effort to maximize the accessibility of video programming to hearing impaired Americans in accordance with the mandate of Section 713. The Commission should do so, however, in a manner that also accounts for the implementation burdens and costs to entrants like DIRECTV that are attempting to gain a toehold in the MVPD market. The more outlets that become available for MVPD offerings, the more outlets there will be for closed captioned programming. Because competition also will promote the goals set forth in Section 713, the Commission should not give effect to proposals that impede its development.

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<sup>37</sup> 47 C.F.R. § 15.119; *see* 47 C.F.R. § 76.606 (requiring compliance with § 15.119).

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gary M. Epstein", is written over a horizontal line.

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